(3)

No. 85-1439

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANKLIN AND MARSHALL COLLEGE, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may have access to information in a college's tenure review files relevant to its investigation of a Title VII charge that the college discriminatorily denied a professor tenure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-25a) is reported at 775 F.2d 110. The order of the district court (Pet. App. 29a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1985. A petition for rehearing was denied on November 29, 1985 (Pet. App. 26a-28a). The petition for a writ of certiorari was filed on February 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the Eastern District of Pennsylvania ordered petitioner to comply with a subpoena issued by the Equal Employment Opportunity

Commission (EEOC or Commission) (Pet. App. 29a). The court of appeals affirmed (*id.* at 1a-25a).

1. In June 1981, Gerard Montbertrand, then an Assistant Professor in petitioner's French Department, filed a charge with the EEOC alleging that petitioner violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by denying him tenure because of his national origin. Montbertrand had been recommended for tenure by his department, but petitioner's Professional Standards Committee, consisting of five elected tenured faculty members and the Dean of the College, subsequently recommended denial of tenure. The Committee's recommendation was adopted by petitioner's dean and president.[1] Montbertrand was advised by the College president that the Committee recommendation against tenure was based upon his "deficiencies in the areas of scholarship and general contributions [which] were not sufficiently offset by performance in other areas". Pet. App. 2a-3a.

The EEOC began its investigation by seeking, through a questionnaire, information about the allegations in the charge. When some of the requested information was not provided, the EEOC issued a subpoena seeking information regarding petitioner's tenure decisions made between November 1977 and July 1983, including tenure recommendation forms prepared by faculty members, annual evaluations, letters of reference, and evaluations of publications by outside experts; notes, letters, and memoranda considered during the tenure deliberations; and minutes of Professional Standards Committee tenure meetings beginning in November 1977. Petitioner refused to provide the

[1]Montbertrand subsequently sought reconsideration by the Committee, which reaffirmed its decision (Pet. App. 3a). He also filed a petition with the College Grievance Committee seeking review of the tenure denial, but his petition was denied (*ibid.*).

bulk of this information, arguing inter alia that the material was protected by a qualified academic peer review privilege. Pet. App. 3a-5a.[2]

2. a. The Commission, after issuing a denial of petitioner's administrative petition to revoke the subpoena (Pet. App. 30a-37a), brought this subpoena enforcement action. The district court ordered the subpoena enforced in its entirety and, with the EEOC's concurrence, allowed petitioner to delete the names of professors and identifying data contained in the material. *Id.* at 5a-6a, 29a.

b. The court of appeals (Pet. App. 1a-25a) affirmed the district court's enforcement order. It first declined to create a qualified academic peer review privilege (*id.* at 6a-10a). The court, following its own precedent, "concluded from the legislative history of Title VII and its amendments that, notwithstanding principles of academic freedom, tenure decisions fall within the intended scope of the Act" (*id.* at 10a (citation omitted)). The court reasoned that " 'Congress must have recognized that in order to achieve its legislative goals, courts would be forced to examine critically university employment decisions' " (*ibid.* (quoting *Davis* v. *Weidner*, 596 F.2d 726, 731 (7th Cir. 1979)).[3]

[2]Petitioner resisted production of documents which relate to Montbertrand's denial of tenure as well as documents relating to other tenure candidates. Petitioner did allow an EEOC investigator to review the minutes of the Professional Standards Committee's consideration of Montbertrand, but now refuses to allow the EEOC any additional access to those minutes. See C.A. App. 63a-64a.

[3]The court of appeals recognized the petitioner's interest in the confidentiality of its peer review process, but concluded that this interest must give way to Congress's mandate that academic employers abide by the strictures of Title VII: "[W]e have no choice but to trust that the honesty and integrity of the tenured reviewers * * * will overcome feelings of discomfort and embarrassment" which may result from the fact that their decisions could be reviewed by the EEOC if challenged as discriminatory (Pet. App. 10a).

The court also declined to require an initial showing by the EEOC of some merit to its charge prior to a disclosure order (Pet. App. 11a-14a). It found petitioner's argument to the contrary to be "inconsistent with the language, history and purpose of Title VII and with Congress' grant of investigatory authority to the EEOC" (*id.* at 11a). It relied explicitly on this Court's decision in *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984), which, it pointed out, made clear that a district court need not find the "charge of discrimination to be well-founded, verifiable, or based on reasonable suspicion before enforcing an EEOC subpoena" (Pet. App. 11a). The court of appeals emphasized that, while neither the EEOC nor the courts may reevaluate a candidate's qualifications, the EEOC's statutorily mandated role is to determine whether there is evidence to support a charge of discrimination. To this end, the peer review materials "must be investigated to determine whether the evaluations are based in discrimination" and the "alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation" (*id.* at 12a-14a).[4]

ARGUMENT

Petitioner makes two arguments in favor of certiorari: (1) that colleges and universities are entitled to a special privilege exempting them to some (unspecified) extent from the legal proceedings necessary to enforce the civil rights laws

[4]Chief Judge Aldisert dissented (Pet. App. 15a-25a). He expressed the view that the subpoena should be enforced insofar as it seeks tenure review materials regarding the specific decision to deny Montbertrand tenure (*id.* at 24a), but should not be enforced in its entirety until the EEOC has "show[n] that it had established a sufficient factual and legal basis to warrant the serious intrusion into [petitioner's] tenure review process in other cases" (*id.* at 18a). The dissent castigated the majority for "slavish allegiance to conceptual jurisprudence" and failing to "consider the decision's consequence upon the social order" (*id.* at 22a).

and to which most other organizations in this country are subject; and (2) that a conflict exists in how the courts of appeals have treated challenges by academic institutions to civil rights proceedings. But there is no basis for the special privilege petitioner seeks, and any conflict is nascent at best, minor in any event, and likely to recede in light of this Court's recent decision in *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984). Accordingly, further review is not warranted.

1. The court below correctly held that academic peer review materials must be produced by universities if the subpoenaed materials are relevant to a charge of discrimination. The court's rejection of a qualified academic freedom privilege for peer review documents underlying academic tenure decisions accords with the precept that privileges, because they "contravene the fundamental principle that the 'public . . . has a right to every man's evidence,' " are not favored under federal law (*Trammel* v. *United States*, 445 U.S. 40, 50 (1980), quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)). See also *Herbert* v. *Lando*, 441 U.S 153, 175 (1979); *United States* v. *Nixon*, 418 U.S. 683, 709-710 (1974). Consequently, privileges should be accepted " 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth' " (*Trammel*, 445 U.S. at 50, quoting *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). Similarly, in determining whether to create a new privilege it is also appropriate to analyze first whether there are other "important interests at stake in opposing the creation of the asserted privilege" (*Herbert* v. *Lando*, 441 U.S. at 171; see Pet. App. 9a-10a). Adoption of the privilege advocated by petitioner would conflict not only with the fundamental truth-seeking function of the judicial system, but also with the paramount national interest of non-discrimination in

employment (see, *e.g., Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 (1974)). In declining to create a privilege, the court of appeals properly held that the interest of academic employers in the confidentiality of tenure review evidence was insufficient to overcome this interest.[5]

Certainly, Congress did not contemplate such a privilege under Title VII. In 1972, it extended to educators the same protection Title VII affords other employees (Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-104; see *Kunda* v. *Muhlenberg College,* 621 F.2d 532, 550 (3d Cir. 1980)). Congress removed the exemption for educational institutions based upon its conclusion that "[t]here is nothing in the legislative background of Title VII, *nor does any national policy suggest itself*" to support the exemption (S. Rep. 92-415, 92d Cong., 1st Sess. 12 (1971) (emphasis added)); see also H.R. Rep. 92-238, 92d Cong., 1st Sess. 19-20 (1971); 118 Cong. Rec. 1992 (1972) (remarks of Sen. Williams). Indeed, in extending Title VII to cover institutions like petitioner, Congress rejected arguments similar to those raised by petitioner here (see 118 Cong. Rec. 1993 (1972) (remarks of Sen. Allen) (coverage of educational institutions would "place[] in serious jeopardy" "[a]cademic tenure—the very cornerstone of academic freedom")). Accordingly, Congress intended that "educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the Act" (S. Rep. 92-415, *supra,* at 12) and that the courts and the EEOC "would be forced to examine critically university employment decisions" (*Davis* v. *Weidner,* 596 F.2d 726, 731 (7th Cir. 1979)). See also 42 U.S.C. 2000e-5(b), 2000e-8(a), 2000e-9.

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[5]Cf. *Branzburg* v. *Hayes,* 408 U.S. 665 (1972) (declining to create a privilege for newsmen from grand jury testimony). If a privilege for a newsman is rejected, so should be the suggested privilege for petitioner, whose First Amendment claim here is much more tenuous.

Petitioner proposes indefinite but potentially substantial restrictions on the availability to the Commission and the courts of the information on which it bases its employment decisions. The asserted privilege would make examination of academic employment decisions difficult or impossible and, thus, thwart Congress's explicit direction to the Commission to enforce Title VII against academic employers as vigorously as against all other employers. Without complete information about a challenged employment decision, neither the EEOC nor the courts would be able to determine whether discrimination has played a role in it. Here, for instance, only by examining petitioner's decision-making and its treatment of similarly situated individuals can the Commission determine whether the asserted reasons for the denial of tenure were pretextual and, thus, whether there was discrimination against the charging party. Any requirement that the EEOC make some sort of preliminary showing before obtaining relevant peer review materials would be particularly inappropriate and detrimental to Title VII enforcement (see Pet. App. 24a-25a (Aldisert, C.J., dissenting)). Adoption of such a standard would be contrary to this Court's admonition in *EEOC* v. *Shell Oil Co.,* 466 U.S. 54, 72 n.26 (1984), that "any effort by the court [in a subpoena enforcement proceeding] to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error."

Petitioner's interest in academic freedom will not be affected by a refusal to create the privilege it seeks. Academic freedom in its legitimate sense—the ability of a scholar to express and examine unconventional ideas without fear of reprisal or censure (see *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957) (plurality opinion); *id.* at 262-263 (Frankfurter, J., concurring))—is not seriously implicated by Commission or court review of the peer review process

for evidence of unlawful discrimination.[6] Indeed, if academic freedom were construed to require complete secrecy of the process, "it would rapidly become a double-edged sword threatening the very core of values that it now protects" (*In re Dinnan,* 661 F.2d 426, 430 (5th Cir. 1981)). Any constitutional guarantees that protect the university's selection of faculty exist to protect its right to select educators " 'on academic grounds' " (*Sweezy* v. *New Hampshire,* 354 U.S. at 263 (Frankfurter, J., concurring) (citation omitted)); they cannot be used as a shield when the charge under investigation is precisely that the tenure decision was not made on academic grounds, but on the basis of sex, race, or national origin (*Gray* v. *Board of Higher Education,* 692 F.2d 901, 909 (2d Cir. 1982); *In re Dinnan,* 661 F.2d at 430; see also *EEOC* v. *University of Notre Dame du Lac,* 715 F.2d 331, 337 (7th Cir. 1983); cf. *Hishon* v. *King & Spalding,* 467 U.S. 69, 78 (1984); *id.* at 81 (Powell, J., concurring)).[7]

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[6]There are numerous cases in which courts have reviewed peer review materials to determine whether an institution's asserted reasons for its decision were mere pretext masking discrimination, without apparent harm to the peer review process (or, apparently, even objection from the university). See *Craik* v. *Minnesota State University Bd.,* 731 F.2d 465, 482-483 (8th Cir. 1984); *Zahorik* v. *Cornell University,* 729 F.2d 85, 89-91 (2d Cir. 1984); *Banerjee* v. *Board of Trustees,* 648 F.2d 61, 64 n.5 (1st Cir.), cert. denied, 454 U.S. 1098 (1981); *Smith* v. *University of North Carolina,* 632 F.2d 316, 323-331 (4th Cir. 1980); *Kunda* v. *Muhlenberg College,* 621 F.2d at 544-546; *Manning* v. *Trustees of Tufts College,* 613 F.2d 1200, 1203 (1st Cir. 1980); *Sweeney* v. *Board of Trustees,* 604 F.2d 106, 112 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980); *Scott* v. *University of Delaware,* 601 F.2d 76, 81 (3d Cir.), cert. denied, 444 U.S. 931 (1979); *Powell* v. *Syracuse University,* 580 F.2d 1150, 1152, 1156 (2d Cir.), cert. denied, 439 U.S. 984 (1978).

[7]Accordingly, petitioner's citations (at 13, 15) to *Sweezy* and *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), are inapposite. Nor do the other cases discussing academic freedom cited in the petition (at 12-15) support petitioner's argument. Justice Powell's concurrence in *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 312 (1978), involved the permissibility of diversity as a university goal for its student body—not immunization from Title VII discovery. Cf. *Bob Jones University* v. *United States,* 461 U.S. 574, 604 (1983). In *Regents of the University of Michigan* v. *Ewing,* No. 84-1273 (Dec. 12, 1985), the Court was faced not with a discrimination claim, but a substantive due process claim asking the Court to review the academic decision itself, not to determine whether an impermissible factor such as race or national origin influenced the decision. While stating its reluctance to second guess the decision by a university not to allow a student to retake an exam, the Court clearly left open the possibility that review in a case like the instant one would be warranted (slip op. 11 (emphasis added; footnote and citation omitted)):

> When judges are asked to review the substance of a *genuinely academic decision,* such as this one, they should show great respect for the faculty's professional judgment. Plainly they may not override it *unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.*

In short, there can be no serious contention that the holding below conflicts with decisions of this Court. This Court has never suggested that academic freedom limits enforcement of Title VII. Rather, this Court consistently has recognized Congress's judgment that the elimination of discrimination in employment is a national priority of the highest order. See, *e.g., Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 (1974).

Finally, enforcement of the subpoena will involve only a minimal infringement upon the college's interest in confidentiality. Petitioner may delete the names and identifying characteristics of peer reviewers from the records to be disclosed. Moreover, there will be no public disclosure as a result of compliance with the subpoena. Enforcement of the subpoena merely requires petitioner to provide its records to the agency authorized by Congress to receive them. The EEOC is, under threat of criminal penalities, specifically prohibited from publicly disclosing such records (see 42 U.S.C. 2000e-8(e)).[8] And once litigation commences, if it

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[8]The only disclosure permitted is to charging parties in contemplation of litigation, to witnesses where disclosure is deemed necessary for securing appropriate relief, or to interested governmental agencies (29

does, a defendant, university, or college can protect itself against disclosure by securing a protective order (see *EEOC* v. *University of Notre Dame du Lac,* 715 F.2d at 340; *EEOC* v. *Bay Shipbuilding Corp.,* 668 F.2d 304, 312 n.9 (7th Cir. 1981); *Jepsen* v. *Florida Board of Regents,* 610 F.2d at 1385)).

2. Although, as petitioner states, the courts of appeals have professed various stands on whether an academic privilege could ever be recognized, every appellate court but one to face the question has ruled that the Commission's or a plaintiff's need for relevant information to prove a discrimination claim outweighed the academic institution's interest in nondisclosure. See *Gray* v. *Board of Higher Education,* 692 F.2d 901 (2nd Cir. 1982) (court declined to recognize a privilege and, applying a "balancing" test, ordered disclosure of tenure committee votes); *In Re Dinnan,* 661 F.2d 426 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982) (privilege rejected; court affirmed order in employment discrimination suit finding member of tenure committee in contempt for his refusal to disclose vote); *Lynn* v. *Regents of the University of California,* 656 F.2d 1337, 1346-1349 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982) (in dictum, court strongly suggested that tenure review file, including peer evaluations, be disclosed to plaintiff on remand); *Jepsen* v. *Florida Board of Regents,* 610 F.2d 1379, 1384-1385 (5th Cir. 1980) (disclosure of faculty evaluation forms of other professors ordered). See also *Keyes* v. *Lenoir Rhyne College,* 552 F.2d 579, 581 (4th

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C.F.R. 1601.22). See also *EEOC* v. *Associated Dry Goods Corp.,* 449 U.S. 590 (1981). Even this limited disclosure is further circumscribed by the Commission's procedures. Before disclosing any information, the Commission requires of each potential recipient a signed agreement not to disclose the information "except in the normal course of a civil action or other proceeding instituted under Title VII" (EEOC Compliance Manual § 83.4(b) (CCH) ¶ 1784, at 1421-1422 (Apr. 1986)).

Cir.), cert. denied, 434 U.S. 904 (1977) (in dictum, the court said that "if the College had sought to justify any male-female disparity on the basis of these [confidential peer] evaluations the plaintiff should have been granted the opportunity to use them"). There is, accordingly, no need for the Court to resolve any conflict among the standards articulated by these courts.[9] In the only case decided in favor of a university on this issue, *EEOC* v. *University of Notre Dame du Lac,* 715 F.2d 331, 338 (7th Cir. 1983), the court's holding was that the university could delete names and identifying data from its tenure review files before disclosing them to the Commission.[10] The issue of whether a privilege protects the production of unredacted files is not presented here, because disclosure of redacted files is all that has been ordered in this case.[11] Thus, no clear conflict has emerged in

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[9]Some of these cases, notably *Gray,* are distinguishable as well because they do not involve the EEOC's Title VII subpoena authority. See *Gray,* 692 F.2d at 905; cf. *University of Notre Dame du Lac,* 715 F.2d at 337 n.3. Thus, not only did the Second Circuit decline to create a privilege (692 F.2d at 904), it declined to do so in a discovery situation where it had more flexibility than had it been faced with the Commission's explicit statutory mandate.

[10]The Seventh Circuit stated, in dictum, that "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available" (715 F.2d at 337 n.4). The notion that a charge must be shown to have some merit before a court can enforce an EEOC subpoena seeking documents relevant to the charge was rejected in *EEOC* v. *Shell Oil Co.,* 466 U.S. 54, 71-72, 77, 81 (1984); *id.* at 93-94 (O'Connor, J., concurring in part and dissenting in part), which was issued after the Seventh Circuit's ruling in *Notre Dame.* Indeed, the Court said that requiring such a showing "would be reversible error" (*id.* at 72 n.26). See also *United States* v. *Arthur Young & Co.,* 465 U.S. 805, 815-817 (1984) (also decided after *Notre Dame*).

[11]Moreover, as a general matter, the assertion of academic privilege by defendant in *Notre Dame* was considerally more modest in scope than it is here.

the circuits regarding an academic employer's obligation to provide peer review materials in response to either a Commission subpoena or a private plaintiff's discovery in a discrimination action.

Indeed, the EEOC would be entitled to production of this evidence under any of the standards articulated by the courts of appeals. Those circuits that balance a plaintiff's need for disclosure against an academic employer's interest in confidentiality have indicated that the balance tips in favor of disclosure of peer review information relevant to a claim of discrimination where the academic employer relied upon the requested material in making the tenure decision (see *Gray,* 692 F.2d at 905-906 ("[i]f the defendant's claim that the tenure denial was based on evaluations of [plaintiff's] performance discussed at the [committee] meeting, then certainly [plaintiff] will be hamstrung if denied disclosure"); and *Lynn* v. *Regents of the University of California,* 656 F.2d at 1347). Here, petitioner claimed that it refused to award Mr. Montbertrand tenure because of, for instance, deficiencies in his research. In order to determine whether this was in fact petitioner's reason, and not a pretext, the Commission needs to examine the evaluations upon which petitioner relied and to compare them with evaluations of similarly situated tenure candidates. Similarly, disclosure would be ordered even if the Seventh Circuit's "particularized need" standard (*EEOC* v. *University of Notre Dame du Lac,* 715 F.2d at 338) were applied. Inasmuch as the information is not available from any other source and is critical to EEOC's ability to conduct an adequate investigation, "the need of the party seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the privilege" (*ibid.* (citations omitted)). See *Langland* v. *Vanderbilt University,* 589 F. Supp. 995, 1008 (M.D. Tenn. 1984) (citation omitted) ("even those courts which profess to recognize such [an academic] privilege

require production of the files when the defendants rely upon the evaluations contained in them to justify their actions"), aff'd, 772 F.2d 907 (6th Cir. 1985) (Table).

The differences in professed approaches in the cases cited by the petitioner do not rise to the level of an actual conflict; as discussed, they have not led to different results so far. Moreover, whatever nascent conflicts there may be in the circuits will not be a problem at all for a given college, which necessarily will have only one circuit standard with which to deal. The EEOC, for whom alone a lack of national uniformity would pose problems, is willing to wait and see whether a practical conflict does develop, particularly in light of this Court's intervening decision in *EEOC* v. *Shell Oil Co.* If the Seventh Circuit (or another court of appeals) ignores *Shell Oil,* and a practical conflict does develop, it can be resolved at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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